U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: J. Caye Premier Dining, Inc.

File: B-421890

Date: November 2, 2023

Matthew E. Feinberg, Esq., Katherine B. Burrows, Esq., Joseph P. Loman, Esq., and Dozier L. Gardner, Jr., Esq., Piliero Mazza PLLC, for the protester.
Major Jill B. Wiley, and Lieutenant Colonel Nolan T. Koon, Department of the Army, for the agency.
Nathaniel S. Canfield, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that priority under the Randolph-Sheppard Act, 20 U.S.C. § 107, must be afforded to all licensed blind vendors, rather than state licensing agencies, is denied where the protester has not advanced a reasonable construction of the Act and its implementing regulations.

2. Protest alleging that the solicitation is ambiguous regarding how priority under the Randolph-Sheppard Act will be applied with respect to a best-value tradeoff is dismissed as academic where the agency has stated that it will amend the solicitation to resolve potentially conflicting terms.

DECISION

J. Caye Premier Dining, Inc., a small business of Houston, Texas, protests the terms of request for quotations (RFQ) No. W81K0023Q0092, issued by the Department of the Army for the provision of a food service supervisor and food service workers/cashiers to supplement the staff at Evans Army Community Hospital at Fort Carson, Colorado. The protester contends that the RFQ improperly limits application of the preference under the Randolph-Sheppard Act (RSA) and is ambiguous as to how that preference will be applied.

We deny the protest in part and dismiss it in part.

BACKGROUND

The agency issued the RFQ pursuant to Federal Acquisition Regulation part 12 on June 29, 2023, and amended it twice. Contracting Officer's Statement (COS) at 2; Agency Report (AR), Tabs 3, 5, 7. The RFQ seeks quotations for food service staffing at Evans Army Community Hospital at Fort Carson, Colorado. COS at 2; AR, Tab 3, RFQ at 35. The RFQ contemplates award of a single, fixed-price contract with a 1-year period of performance and four 1-year option periods. RFQ at 3-7, 11, 36.

Relevant here, the RFQ states that the agency will accept quotations only from the state licensing agency (SLA) in accordance with the RSA or small businesses.[1] AR, Tab 3a, Instructions to Offerors, at 1. The RFQ further explains:

> This procurement is subject to the [RSA], 20 U.S.C. § 107, Operation of Vending Facilities and 34 C.F.R. § 395.33, Operation of Cafeterias by Blind Vendors, which establishes a priority for blind persons recognized and represented by the [SLA], in the award of contracts for the operation of cafeterias on federal facilities. . . . This notice is not designed to discourage competition[;] rather, it notifies all potential [vendors] that the priority established by the [RSA] for [quotations] received from SLAs and their blind vendors is applicable to this procurement. The evaluation criteria [are] the same for all competing [vendors], including the responsible SLA. The award will only be made to a [s]mall [b]usiness concern or an SLA. If the SLA is dissatisfied with an action taken relative to its [quotation], it may file a complaint with the Secretary of Education under the provisions of 34 C.F.R. § 395.37.

Id.[2]

In setting forth evaluation criteria, the RFQ advises that "if one or more RSA [SLAs] submits a [quotation], the source selection will be carried out in accordance with 20 U.S.C. § 107, 34 C.F.R. § 395.33, and other relevant laws and regulations as applicable." *Id.* at 4. The RFQ further states that award will be made on a best-value tradeoff basis considering past performance and compensation plan factors, with the additional requirement that an SLA vendor is required to submit an acceptable subcontracting plan. *Id.*

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[1] An SLA is an agency of a State, territory, possession, Puerto Rico, or the District of Columbia designed by the Secretary of Education to issue licenses to blind persons for the operation of vending facilities on Federal and other property. 34 C.F.R. § 395.1(v).

[2] Per 34 C.F.R. § 395.37(a), an SLA may file a complaint with the Secretary of Education whenever an SLA determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the RSA. The complaint will then be subject to binding arbitration proceedings. *Id.* (b).

On July 26, 2023, the protester filed an agency-level protest, arguing that the RFQ improperly limited application of the priority under the RSA to SLAs and that the priority should instead be given to all blind vendors.[3] AR, Tab 21, Agency-Level Protest at 4-7. The protester additionally alleged that the RFQ was ambiguous regarding how the RSA priority would be applied in light of the RFQ's stated best-value tradeoff method of award. *Id.* at 7-8. The agency denied that protest on August 14, stating that the agency had complied with its obligations under the RSA and its implementing regulations by notifying Colorado's SLA of the procurement and that it would be given priority if it submitted a competitive quotation. AR, Tab 22, Agency-Level Protest Response at 2. The agency also denied the allegation of ambiguity, stating that "even with the RSA applied, [vendors] must still present competitive [quotations] to win an award." *Id.* at 3.

Thereafter, the protester filed the instant protest with our Office on August 15.

DISCUSSION

Application of the Randolph-Sheppard Act

This procurement is being conducted pursuant to the RSA, which establishes a priority for blind persons recognized and represented by SLAs in the operation of vending facilities, including cafeterias, in federal buildings. 20 U.S.C. § 107; 34 C.F.R. § 395.33(a); *see also The State of Oklahoma*, B-416851.9, Sept. 22, 2020, 2020 CPD ¶ 341 at 3-4 (describing the RSA and its implementing regulations). With respect to the operation of cafeterias at federal facilities, the Act directs the Secretary of Education to issue regulations to establish a priority for blind licensees whenever "such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise." 20 U.S.C. § 107d-3(e). Pursuant to this authority, the Secretary of Education has promulgated regulations addressing the RSA's requirements. The implementing regulations provide that federal agencies requiring cafeteria services must invite "the appropriate [SLA]" to respond to a solicitation for such services. 34 C.F.R. § 395.33(b). If the SLA submits an offer found to be within the competitive range for the acquisition, the agency is required to consult with the Department of Education (DOE), in an effort to obtain the services at a reasonable cost. *Id.* § 395.33(a), (b).

The protester first alleges that the RSA and its implementing regulations do not limit the priority afforded under those authorities to SLAs. Protest at 8. The protester argues that nothing in the statute restricts the priority to SLAs, and that its provisions indicate that "the priority belongs to any and all blind vendors licensed by any and all state

[3] A vendor is a blind licensee who is operating a vending facility on Federal or other property. 34 C.F.R. § 395.1(aa). The applicable regulations further define a blind licensee as a blind person licensed by the SLA to operate a vending facility on Federal or other property, *id.* at (b), and a vending facility, in relevant part, as a cafeteria, *id.* at (x).

agencies." *Id.* The protester further contends that the RSA's implementing regulations "broadly apply the priority to all licensed blind vendors[,]" and do not limit application of the priority to the SLA of the state in which the work is to be performed. *Id.* Consequently, the protester contends, the RFQ "is contrary to the plain language and purpose of the RSA and implementing regulations" by limiting application of the priority to the Colorado SLA.[4] *Id.* at 9.

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[4] The agency initially requested dismissal of the protest pursuant to 20 U.S.C. § 107d-1(b) on the basis that our Office did not have jurisdiction over the protester's complaint that the agency was failing to comply with the requirements of the RSA. As our Office repeatedly has recognized, the RSA and its implementing regulations vest authority with the Secretary of Education regarding SLA complaints concerning a federal agency's compliance with the RSA. *See, e.g.*, *The State of Oklahoma*, *supra* at 4; *Louisiana State Dep't of Soc. Servs. Louisiana Rehab. Servs.*, B-400912.2, July 1, 2009, 2009 CPD ¶ 145 at 2; *Washington State Dep't of Servs. for the Blind*, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84 at 3-5; *Mississippi State Dep't of Rehab. Servs.*, B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3; *see also* 20 U.S.C. § 107d-1(b). Pursuant to those authorities, we will not consider such complaints by an SLA. Here, however, the protester is a licensed blind vendor--not an SLA--challenging an agency's compliance with the RSA; therefore, the mandatory arbitration provisions applicable to SLAs did not apply to the protester.

After receipt of the agency report, our Office invited the parties to further address the question of GAO's jurisdiction and the protester's interested party status. In response to our request for additional briefing, the agency argues that Congress similarly has mandated an avenue for blind vendors' disputes in 20 U.S.C. § 107d-1(a). *See* Agency Resp. to Req. for Additional Briefing at 7-8. That provision requires a blind licensee "who is dissatisfied with any action arising from the operation or administration of the vending facility program" to submit a request for an evidentiary hearing to an SLA, and that a licensee dissatisfied with any action taken or decision rendered thereafter may file a complaint with DOE, which will convene a panel to arbitrate the dispute. *See* 20 U.S.C. § 107d-1(a).

The agency contends that the protester, as a licensed blind vendor, can receive the benefit of the priority only if the protester's SLA submits a quotation, as the RSA and its implementing regulations limit application of the priority to SLAs. Agency Resp. to Req. for Additional Briefing at 7. Accordingly, the agency asserts that to the extent the protester wishes to obtain the benefit of the priority, the protester must seek redress with the Texas SLA, not our Office, pursuant to 20 U.S.C. § 107d-1(a). *Id.* The protester's challenge, however, is that the RSA and its implementing regulations entitle all licensed blind vendors, not just SLAs, to the priority. Thus, reaching the foundational premise of the agency's argument--that only an SLA can obtain the priority under the RSA--requires us to reach the merits of the protester's challenge--that all licensed blind vendors, including the protester, are entitled to the priority. Consequently, we decline to dismiss the protest because resolving the agency's dismissal argument nevertheless requires us to address the merits of the protester's challenge.

Our analysis begins with the interpretation of the relevant statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the 'language of the statute.'"). In construing the statute, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). Generally, we must give effect to all words in the statute, as Congress does not enact unnecessary language. *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 147 (2017) (citing *Hibbs v. Winn*, 542 U.S. 88, 89 (2004)). It is a cardinal principle of statutory construction that a statute ought to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Our Office likewise applies the "plain meaning" rule of statutory interpretation. *See, e.g.*, *Oracle Am., Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180 at 16.

The primary support offered by the protester for its argument is that 20 U.S.C. § 107(a) provides that "blind persons licensed under the provisions of [the] RSA shall be authorized to operate vending facilities[,]" and that paragraph (b) of that section further states that "priority shall be given to blind persons licensed by a State agency[.]" Comments at 8. The protester asserts that "the inquiry ends there[;]" the statute affords priority to licensed blind vendors, and therefore all licensed blind vendors are entitled to that priority. *Id.* The protester's interpretation, however, fails to give effect to all words in the statute, in particular those that follow in that same paragraph (b), which direct the Secretary of Education to "prescribe regulations designed to assure that . . . the priority . . . is given to . . . licensed blind persons[.]" 20 U.S.C. § 107(b). Similarly, as discussed above, 20 U.S.C. § 107d-3(e) directs the Secretary of Education to "prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees[.]" Thus, the provisions cited by the protester do not end the inquiry. Rather, when giving effect to all words, the statute requires review of the implementing regulations to determine how the statutorily-required priority is to be applied.

Turning to the implementing regulations, the protester again cites broad language providing for a priority to be afforded to blind vendors. *See* Comments at 8 (citing 34 C.F.R. §§ 395.33(a), 395.30(a)). The protester argues that "[t]his plain language makes clear that the RSA priority applies to *all* licensed blind vendors, not just the SLA in the state of the procurement and the blind vendor it chooses for a specific bid." *Id.* Again, however, the protester's interpretation fails to give effect to all words in the implementing regulations.

It is true that, as the protester points out, 34 C.F.R. § 395.33(a) affords a "[p]riority in the operation of cafeterias by blind vendors on Federal property[.]" That provision goes on, however, to explain that the priority is to be afforded when the Secretary of Education determines, in consultation with the procuring activity, "that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees[.]" 34 C.F.R. § 395.33(a). The next paragraph sets forth the manner in which it will be determined that a blind vendor can provide operation at a reasonable cost and with comparable quality, stating that "[i]n order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitations[.]" 34 C.F.R. § 395.33(b). Thus, the regulations contemplate that, in order to provide for the priority required under the statute, "the appropriate State licensing agency"--not licensed blind vendors--will be invited to respond to solicitations, such as the one at issue here, for cafeteria services.[5]

That sentence, too, is not the end of the inquiry. Paragraph (b) continues, setting forth the circumstances under and the manner in which the statutorily required priority is to be afforded. To that end, paragraph (b) further provides that "[i]f the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award," the procuring activity is to consult with DOE to determine if the services can be provided at a reasonable cost and comparably high quality. *Id.* Read in context, it is clear that "the State licensing agency" referenced in this sentence can only be "the appropriate State licensing agency" referenced earlier in the paragraph. Thus, the regulations further contemplate that it is only a response received from the appropriate SLA--not from an individual blind vendor--that is to receive the priority.[6]

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[5] Additionally, 34 C.F.R. § 395.33(d) provides that agencies may afford priority in the operation of cafeterias by blind vendors through direct negotiations with SLAs.

[6] Because we conclude that the applicable regulations contemplate that the RSA priority is to be afforded only to an SLA--as opposed to any licensed blind vendor, as the protester urges--we need not reach the question of the reasonableness of the agency's interpretation that only the SLA from the state of performance is to be invited to respond to the RFQ and be afforded the priority. We note, however, that the protester appears to concede that "the appropriate State licensing agency" referenced in 34 C.F.R. § 395.33(b) is the SLA of the state in which performance will occur. *See* Protest at 9 ("[T]he regulations require the Agency to invite the SLA from the state of performance to respond to the Solicitation[.]") (citing 34 C.F.R. § 395.33(b)). The fact that the regulation then twice uses the definite article "the" in referring to "the proposal received from the State licensing agency" suggests that the regulations contemplate only a single proposal from a single SLA.

In arguing that the RSA and its implementing regulations require affording priority to all licensed blind vendors, rather than SLAs, the protester has not advanced a reasonable reading of the Act and the applicable regulations. We therefore deny this ground of protest.

Solicitation Ambiguity

The protester further contends that the RFQ is ambiguous as to how the RSA priority, as it relates to the best-value tradeoff methodology, will be applied. Protest at 10. The crux of the protester's concern is rooted in the sections of the RFQ stating that "[t]he evaluation criteria [are] the same for all competing [vendors], including the responsible [SLA]," but also stating that the procurement is subject to the priority afforded under the RSA. *Id.* As the protester points out, these provisions potentially are in conflict; unless the SLA, which is entitled to the RSA priority, submits the best-value quotation, the agency would be faced with awarding the contract to either the vendor that submits the best-value quotation (in which case the agency would not be affording the priority under the RSA), or to the SLA (in which case the agency would not be awarding to the vendor submitting the best-value quotation). *Id.*

In response to this allegation, the agency has notified us of its intent to take actions that will render the protest academic. Specifically, the agency advises that it will amend the RFQ, revising its evaluation criteria to state that, pursuant to the RSA, the agency will make award to the SLA, even if the SLA's quotation does not represent the best value, if there is a determination that the requirements in the RFQ can be provided by the SLA at a reasonable cost and with food service of a high quality comparable to that currently provided employees, whether by contract or otherwise. Req. for Dismissal at 9-10. The revised evaluation criteria further will state that the agency will apply the RSA priority only to the quotation submitted by the SLA from Colorado, the state of contract performance. *Id.* at 10.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Honeywell Tech. Solutions, Inc.,* B-407159.4, May 2, 2013, 2013 CPD ¶ 110 at 3. We do not consider academic protests because to do so would serve no useful public policy purpose. *Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. *Id*.

The agency's corrective action renders academic the protester's allegation that the RFQ

is ambiguous as to how the RSA priority will be applied.[7] We therefore dismiss this allegation as academic.

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel

[7] The protester contends that the agency's corrective action does not render this protest ground academic, as it "does not explain how the [a]gency will determine if costs are reasonable[,]" or "when in the process the priority will be afforded." Resp. to Req. for Dismissal at 7. The issue raised by the protester, however, was the apparent conflict between application of the RSA priority and the RFQ's best-value tradeoff methodology. The agency's proffered amendment resolves that apparent conflict. To the extent the protester believes that an RFQ amendment introduces new solicitation infirmities, it is required to timely submit a new protest in accordance with our Bid Protest Regulations.